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OALJ CASE NO.: 2003-SOX-0007

In the Matter of:

Ammar Halloum,

Complainant,

vs.

Intel Corporation,

Respondent.

Appearances:

Christopher Reed, Esq,
For Complainant

Michael D. Moberly, Esq.
For Respondent

RECOMMENDED DECISION AND ORDER

Ammar Halloum (Halloum or Complainant) worked for Intel Corporation (Intel or Employer) at its manufacturing facility in Chandler, Arizona for almost two years. A month after he was presented with a performance plan to address shortcomings in his work, he took an extended medical leave for stomach problems and stress. Reflection on the Enron accounting scandal, which was much in the news then, led him to report to the Securities and Exchange Commission (SEC) that his manager at Intel had instructed him to delay payments for purchases into future quarters, which he believed was a fraudulent accounting practice. When Complainant returned to work his manager altered the performance plan in ways that led him to resign within a few days. He alleges those alterations were meant to set him up to fail, or force his resignation, in retaliation for whistle blowing.

Complainant seeks relief under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, Public Law 107-204, 18 U.S.C. § 1514A (the Act), which applies to companies with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C.

§ 78l) and companies required to file reports under section 15(d) of the Securities Exchange Act of 1934. 18 U.S.C. § 1514A(a). It forbids retaliation or discrimination against employees who provide information to a federal agency, to Congress or to their employer about violations of 18 U.S.C. §§ 1341, 1343, 1344 or 1348, or any provision of federal law relating to fraud against shareholders.

The discrimination complaint he filed with the Occupational Health and Safety Administration (OSHA) on October 16, 2002, was dismissed on February 20, 2003; he made a timely objection to the dismissal. At the trial held in Phoenix, AZ on May 6-7, and 15-16, 2003 and July 1, 2003, Complainant offered Exhibits 1-20, 22-60 and 62, all of which were admitted into evidence. Employer offered Exhibits 2, 4-6, 9, 12, 14-17, 26, 30, 32, 38, 41-43, 45-46, 48-49, 52-53, 56, 29-60 and 62, which also were admitted. I find Intel had legitimate business reasons for the employment actions it took, and dismiss the complaint.

Findings of Fact

Complainant began work at Intel Corporation on October 23, 2000 at its computer chip manufacturing facility known as FAB 12 in Chandler, Arizona, near Phoenix. Transcript of Hearing (TR) at 11, 20. Paul Callaghan, who led FAB 12's Manufacturing Systems Group (MSG), hired him away from IBM to be one of five Group Leaders who reported directly to him. TR at 19, 485, 497. As was common at Intel, no formal description of Complainant's newly created job was prepared when he started, but both his testimony and Callaghan's agree that his primary task as the Spares Group Leader was to reduce costs in the computer chip manufacturing budget. TR at 18, 203, 651. Halloum assumed responsibility for managing spending on spare parts for the 700 to 800 pieces of machinery and equipment FAB 12 used to produce chips. TR at 503-504. This not only included buying new parts and equipment, but monitoring Intel's service contracts with entities like Applied Materials, maker of approximately 40 percent of the tools at FAB 12. TR at 505, 544. Its service technicians maintained and repaired its machines on Intel's manufacturing floors. Halloum also shared responsibility for writing the manufacturing group's purchase requisitions. TR at 549-550. After he analyzed requests for spare parts or maintenance services, he approved necessary purchases. TR at 1173. He was to cut manufacturing spending by troubleshooting the purchase process, eliminating redundant purchases, delaying those that could be deferred, and negotiating lower prices on necessary ones. *Id.* His requisitions went to Intel's purchasing group, which issued purchase orders for the services or parts to a supplier. TR at 550-551. Three commodity analysts reported directly to him: Christian Hess, Tim Theodoseau and Dot Townsend. TR at 19, 140.

Intel's accounts payable department sometimes requested that Halloum's unit acknowledge receipt of parts or services before the supplier's bill would be paid[1]. TR at 543, 545. He verified the supplier, the original purchase requisition number, the unit price of the part or service and the number ordered. TR at 542. Receiving memos are not invoices, which record

[1] These receiving memos were sometimes called RFAs or Requests for Approval. They were generated if the purchase request, purchase order and invoice did not match exactly. When they did, a supplier's bill was paid immediately without any RFA from accounts payable. TR 1025-1027, 1179.

actual payments[2]. TR at 1173-1174. Intel's accounting system required prompt responses to inquiries from accounts payable, escalating the verification request to Callaghan if Halloum's unit had not answered in three days, and escalating it higher if that second request were not answered in another three. TR at 546. It was impossible to delay responses to receiving memos significantly. Moreover, Intel's accrual accounting system recognizes the obligation to pay for items ordered as liabilities as soon as it receives the supplier's bill, before the supplier is paid. TR at 1179-180. Delaying payment does nothing to improve Intel's balance sheet. TR at 745-746, 1180.

Halloum had to adapt to Intel's "highly matrixed environment." Managers and workers from Intel's various groups formed ad hoc units to handle projects or resolve problems and disbanded when the tasks ended. TR at 503, 652. Halloum represented Callaghan's Manufacturing group in meetings or projects with employees from the Purchasing, Finance, Materials and Engineering groups. TR at 503-504, 652. Annual performance evaluations rated how well workers and managers functioned in these fluid interdisciplinary groups. TR at 503-504. Complainant also dealt regularly with people who were not Intel employees, including representatives of Applied Materials and other major suppliers such as Nikon and Novellus. TR at 208, 505, 544, 1184.

Complainant initially enjoyed a measure of success, and received performance-based recognition as a member of larger teams, including an award of Intel stock. CXs 52-54; TR at 898-899. A written review of Complainant's job performance from October, 2000 to February, 2001, listed as his achievements starting and organizing various teams at the FAB 12 plant. CX 50. The review also pointed out that he needed to improve his "engagement" or participation at meetings and become more knowledgeable about Intel's manufacturing processes. *Id.*

Problems were noticed with Complainant's performance before he completed his nine-month probation period. Between the end of January and the end of March, 2001 he attended a doctoral class at Arizona State University during work hours[3] regularly missing work to a degree Callaghan thought excessive for someone with his job responsibilities. TR at 305-306, 686. Nancy Stuart, Callaghan's peer as group manager for the Materials group at FAB 12, told Callaghan in March, 2001 that Halloum still occasionally missed joint project meetings with her department, the contributions made when he attended were minimal, and not valued by team members. TR at 302-303; 660-661. Callaghan met with Complainant to discuss these matters in the hope of improving his performance. EXs 4 and 5; TR at 748. After two such meetings,

[2] At trial, Complainant submitted an "Individual Performance Summary" for mid-year 2001 which lists "Invoice Approval" as one of his accomplishments; however, the entry specifically cites verification of purchase requisitions as the basis for the accomplishment. CX 50 at 3. Intel employees actively participate with their managers in drafting their performance evaluations. See CX 2. Complainant's error in listing invoice approval among his accomplishments went uncorrected by his manager, Callaghan. TR at 566, 1185. While Complainant used the two terms interchangeably before trial, Employer distinguishes between purchase requisitions and invoices. One witness analogized the relationship between the Accounting and Manufacturing groups to grocery shopping: Manufacturing's purchase requisitions equate to a shopping list, and Accounting holds the checkbook in the form of invoices. TR at 1173-1174. Intel's internal controls separate the decision whether to make a purchase from the decision to pay for it. *Id.*

[3] Callaghan had approved Complainant's eligibility for tuition reimbursement for the course, but warned it would be difficult to meet the demands of his new job and complete the course successfully. TR at 684-685.

Complainant told Callaghan they made him uncomfortable and asked Callaghan to discontinue them, which he did. TR at 664-665, 748.

After Stuart told Callaghan on June 22, 2001 that Halloum continued to struggle in interdepartmental meetings, he thought about extending Halloum's probation for continued lack of engagement with various projects, absences from key meetings and the significant amount of missed work. TR at 659, 666-669; EX 6. He emailed these thoughts to Sherry Jacob, of Intel's Human Resources unit at FAB 12, who advised that extending probation was unusual, and would require additional explanation. EX 6; TR at 669, 831-832. Termination was normal when a probationary employee consistently failed to perform adequately. TR at 668-669.

Halloum's subordinates told Callaghan they were concerned about Halloum's ability to run meetings, prepare required presentations on time, or regularly offer useful opinions and ideas on projects. TR at 1002-1003, 1006, 1075-1088. He not only missed interdepartmental meetings he needed to attend, but several times sent Townsend or another cost analyst in his place at the last minute, with minimal preparation, which precluded effective participation by the Spares Group. TR at 1003-1004, 1084-1087. They felt Halloum's deficient knowledge about Intel's manufacturing processes hampered the group's effectiveness and reflected badly on it; they doubted he was willing to learn those processes by "shadowing" subordinates who were more familiar with them. TR at 1005, 1086-1087. Based on these observations, in his July 17, 2001 review at the close of Halloum's probation, Callaghan wrote that Halloum needed to improve in the areas of "leadership, circle of influence, process/business knowledge and team development." EX 7. Invoice approval is not mentioned among Complainant's responsibilities or accomplishments during probation. *Id.*; TR at 580.

Tension between Complainant and Callaghan increased during September, 2001, which Halloum attributes to discrimination based on his faith and national origin in the wake of the terrorist attacks of September 11[4]. CX 6 at 1. Callaghan had given Complainant his midyear review orally on September 10, 2001. TR at 582. He recognized Halloum's positive performance in negotiating with suppliers, confronting negative attitudes within his own team and becoming comfortable with Intel's lack of structure. CX 50 at 4. He recommended that Halloum pay closer attention to detail, improve his level of interaction in both one-on-one and group meetings, and become more knowledgeable about operations, systems and processes at FAB 12. *Id.* Complainant did not receive a written copy of the review until January 3, 2002, an oversight Employer attributes to the general disorder which immediately followed the terrorist attacks. CX 50 at 4; TR at 583.

Callaghan told Complainant he was concerned about his performance during October, 2001. TR at 336-337, 386, 692-693. Callaghan was unsure of what Halloum had accomplished in his first year, for cost improvements after he had been hired came "mostly from engineers focusing on projects and improving the way the equipment runs." TR at 693. He explained that Halloum needed to demonstrate his individual contributions, and not merely rely on productivity increases the hundreds of workers at FAB 12 collectively achieved. TR at 693. Complainant's

[4] Complainant also filed a claim against Intel with the U.S. Equal Employment Opportunity Commission (EEOC). These findings and conclusions of law relate solely to Complainant's claim under the Act. They are not meant to adjudicate any EEOC claim.

responded with an October 21, 2001 email outlining his individual contributions for the month, including "Invoice Verification and Approval." TR at 694; CX 2.

Callaghan initially denied Complainant's request for a four-week vacation from mid to late November to the middle of December, 2001. TR at 39-40. While entitled to three weeks of annual vacation, as a Group Leader with management responsibilities he was limited to two weeks away at that time of year. TR at 322, 682-683. Ultimately they agreed that because he was traveling to the Middle East, Complainant would take his full three-week allotment of vacation. TR at 683. After those three weeks, he came to work only on December 10, 2001, before taking leave for a fourth week, ultimately returning to regular attendance on December 17, 2001. TR at 41-42, 322.

On Halloum's return, Callaghan raised the issue of individual productivity they had discussed in October, again contrasting Complainant's individual contributions with collective ones. TR at 697-698. Callaghan expressed skepticism about Complainant's abilities, telling Halloum that he would feel more confident entrusting projects to group leaders other than Halloum. TR at 323-324, 698.

Callaghan consulted FAB 12's Human Resources manager, Kendall McNail, about Complainant's inadequate performance. TR at 699-700. Intel evaluates employees annually in January, assigning them one of three ratings, from "improvement required" (the lowest), to "outstanding" (the highest). TR at 518. He told McNail he likely would rate Complainant as "improvement required" in January. TR at 699. Employees who receive that rating are placed on a Corrective Action Plan (CAP), specifying their deficiencies and prescribing goals they must achieve within 90 days, or they are terminated. TR at 535, EX 9. A CAP generally serves as a tool to improve inadequate performance, although it also can be used as a form of discipline for rule-breaking. TR at 327, 704. Employees may choose to work to achieve the goals in their CAP, or separate voluntarily from Intel, and be paid for the 90-day period their CAP would have lasted (or pro-rata if they begin a CAP but choose to leave before completing it). EX 62; CX 28 at 2.

McNail advised Callaghan to prepare a CAP if he felt confident Halloum would receive the "improvement required" rating, so Halloum could begin working toward improvement as soon as possible. TR at 585-586, 699-700; EX 62. Callaghan prepared the CAP with assistance from Human Resources in late December, finishing it on December 28, 2001. TR at 585-586, 700; EX 9. The performance deficiencies identified were that Complainant :

1) Required an unusual amount of managerial follow-up;

2) Consistently performed the management of the FAB 12 cost reduction program below expectations;

3) Had difficulty working as part of a matrixed team and was not viewed as a role model;

4) Missed significant amounts of time at work forcing other employees to fill in for him, sometimes with little notice and no effective preparation, resulting in lowered efficiency overall and "a loss in confidence in [Halloum] to deliver on his commitments."

EX 9. Examples of Complainant's absenteeism, failure to be engaged in meetings, and the preference of business partners[5] to deal directly with Callaghan rather than Complainant were given. EX 9.

Successful completion of his CAP required Halloum to attain four goals:

1) assume full responsibility for driving FAB 12's wafer cost reduction program during the first quarter of 2002;

2) build effective working relationships with managers from other departments and with the workers who reported to him;

3) improve his interaction/engagement during formal team meetings; and

4) acquire more knowledge of FAB 12's manufacturing technology and systems by "shadowing" other Intel employees, including his support staff. EX 9.

These were all matters he had been informally counseled about.

Complainant emailed Sherry Jacob of the FAB 12 Human Resources unit around mid-day on January 2, 2002 to invoke Intel's "Open Door" policy that allows an employee to raise work-related issues with a manager or the Human Resources group. EXs 1, 12; TR at 51, 329-330. He complained that Callaghan harassed him and treated him unfairly, and requested information on his rights and how to remedy the situation. TR at 51, 329-330. At a meeting about two and a half or three hours later, Callaghan told Complainant that his performance rating was "improvement required," and presented his CAP. Complainant's Exhibit (CX) 6 at 1; EX 9; TR at 53, 768.

At their meeting the next day (January 3, 2002), Complainant reiterated to Jacob that Callaghan harassed and treated him inappropriately. *Id.*; EX 12. He sought two remedies – rescission of the CAP and the firing of Callaghan. TR at 845. Jacob began the Open Door investigation. TR at 837, 843.

As part of her inquiry, Jacob asked the three commodity analysts who reported directly to Halloum to complete anonymous evaluations to be sent to Callaghan, which they also could send to Complainant. TR at 844-845, 1008, 1094. After receiving this assignment, Townsend, Hess, and Theodoseau told Jacob that Complainant tried to pressure them to tailor their comments to reflect favorably on him and insisted on reviewing their responses before they turned them in. EX 15; CX 57; TR at 1008, 1097-1103. They feared retaliation in their annual reviews (which

[5] "Business partners" referred to the Purchasing, Finance, Engineering or Materials groups within Intel that the Manufacturing group dealt with regularly. TR at 604.

were to take place around that time) if they did not do what Complainant wanted. EX 14; TR at 709-710, 848-849, 1016.

Starting in January 2002, Complainant began to surreptitiously tape-record conversations with each of his three subordinates, Callaghan, Sherry Jacob, Jodi Jacobs (also an employee in FAB 12's Human Resources unit), and the FAB 12 plant managers. TR at 405, 996. About 25 conversations were taped, at least one of which was a telephone call. TR at 405, 411, 416-417. Complainant had read and signed Intel's standard "Discharge and Discipline" guidelines when he was hired, which gave as examples of actions that could result in immediate termination "[v]iolating other's privacy rights such as: [t]ape-recording conversations of others without their knowledge, consent, or proper authorization." Employer's Exhibit (EX) 59 at 2. Complainant knew this when he did the taping. *Id*.; TR at 405. Intel treats unauthorized taping very seriously as "not only contrary to Intel policy, but absolutely contrary…to Intel's culture," which encourages problem-solving by the free expression of ideas and frowns on anything that may chill that expression. TR at 1254.

On January 25, 2002, Callaghan confronted Complainant with Jacob present about influencing his subordinates' answers to Jacob's inquiries, and warned him that further efforts to pressure his subordinates could be grounds for termination. TR at 850-852. Jacob met with Complainant three days later to tell him her investigation of his Open Door complaint found no support for his harassment claim. TR at 847; 852-853. Complainant began a medical leave of absence on February 1, 2002, based on stomach symptoms and work-related stress that his physician initially anticipated would last until April 16, but later was extended to April 29, 2002. CX 4 at 2-4; CX 34 at 1. The papers authorizing medical leave also serve as an application for short term disability benefits. CX 3. Intel continues the salary of employees on medical leave for 90 days. If the Employee is out longer, and had paid a premium to a third party insurer for short term disability insurance, that indemnity benefit is paid for the 91st to the 365th day of medical leave.

Feng Liao, M.D., treated Complainant for gastritis and other symptoms related to an infection of the stomach (h. pylori) during his medical leave. CX 3 at 2. After the January 2, 2002 meeting where Callaghan placed him on the CAP, Complainant also received counseling from a licensed psychologist, Dr. Libby Howell, for symptoms of work-related stress, including depression, fatigue, headaches and anxiety. CX 3 at 4, 5.

During his medical leave, Complainant told the Securities and Exchange Commission on March 14, 2002 that Callaghan had instructed him to delay payment of invoices until subsequent quarters to enable Intel to meet Wall Street expectations. TR at 143-144; CX 5, CX 32. The letter to the SEC states the well-publicized investigation of Enron's collapse prompted his disclosure of unsound accounting practices at Intel. *Id.* On April 16, 2002, he reiterated his allegations in a letter to Craig Barrett, Intel's Chief Executive Officer, charging that Callaghan had discriminated against him on the basis of national origin and religion, and had instructed him to engage in investor fraud. CX 6. Intel began to investigate the allegations. TR 1157-1158. As the CAP preceded these reports to the SEC and Intel's CEO, the disclosures could not have motivated Callaghan to assign the "improvement required" performance rating or place Complainant on the CAP.

The SEC conducted no investigation of its own. TR at 1158-60. It required Intel to investigate itself, focusing especially on FAB 12's payment of invoices to three suppliers during the first three quarters of 2001, and report its findings to the Audit Committee of Intel's Board of Directors and to the SEC. *Id.* Intel had independently begun to investigate the complaint sent to Craig Barrett. In June of 2002, Intel's senior litigation counsel Steve Rodgers assembled an external accounting team and retained outside legal counsel for the self-investigation. TR at 1159-60. Initially Rodgers' team did not know who made the charge, but learned Complainant had been its source during the investigation. TR at 1161. Ultimately the investigation Intel began on its own and the one required by the SEC were merged.

Rodgers' group interviewed employees of Applied Materials and other suppliers that regularly dealt with FAB 12, none of whom substantiated Complainant's claims. TR at 1181. An examination of invoices for goods and services purchased by the Manufacturing group at FAB 12 while Complainant was employed did not bear out the charge of improperly delayed payments. TR at 1182. A review of documents from Complainant's workspace and the laptop computer assigned to him by Intel also turned up no record of instructions to delay payments to suppliers or other documentary evidence to support Halloum's allegations[6]. TR at 1189-1191, 1194. Rodgers' investigation concluded that Complainant had no role with invoices, and that he had confused invoices with purchase requests that he handled on a regular basis[7]. TR at 1176. Additionally, to succeed the alleged fraud would have required more authority and more conspirators than Complainant had alleged. TR at 1182-1183. Rodgers ultimately concluded that Complainant's allegations were unfounded. TR at 1180. The SEC was convinced, for it took no regulatory action after receiving his report.

Before Complainant originally was due to return from medical leave on April 16, 2002, Sherry Jacob met with his subordinates to discuss their feelings about his impending return and to prepare a "Hopes and Fears" document to be given to him when he returned. CX 9 at 3; TR at 859. The Hopes and Fears exercise allows employees to express themselves about imminent change.[8] TR at 717-718. The document listed, among other things, the hope that Complainant

[6] Complainant maintained that paralegals assisting in Rodgers' investigation destroyed papers left in his workspace that supported his allegations of accounting fraud when they went into his locked desk to copy material, and erased relevant files from his Intel laptop and changed the password on that computer while he was on medical leave. Complainant failed to prove his claim that Intel destroyed paper or electronic evidence. TR at 1189-1190, 1316 - 1317. As he never approved or had any role with invoices, I do not believe he had proof that Callaghan told him to delay payments of invoices. Before he heard about Enron's practices while on medical leave, he had not thought Intel had been engaged in any accounting irregularities, and so had no reason to have collected at his workstation evidence to support such claims. Besides, if payments had been improperly delayed, the suppliers ought to have been willing to say so.

[7] Intel operates several counterpart factories to FAB 12 that are meant to function in the same way. Rodgers's team reviewed thousands of purchase requisitions, receiving memos and invoices, inspected a series of documents provided by Halloum, interviewed FAB 12 personnel, and Halloum's counterpart at Intel's New Mexico facility. TR at 1176. The unanimous opinion of those interviewed was that Accounting, not Manufacturing, dealt with invoices. TR at 1176-1177; CX 2. Complainant admitted at trial that he thought that Intel used cash basis accounting rather than accrual accounting, leading him to believe he was approving payment on invoices. TR at 1334-1335. He actually was verifying the proper amount to pay a supplier, by answering RFAs from accounts payable.

[8] Intel commonly held Hopes and Fears meetings on the assignment of a new manager, or in this case, the return of a manager. TR at 858.

would "learn the business," and "repair his relationship with the other Manufacturing Systems Group [group leaders]." CX 9 at 4. Complainant's subordinates also feared his return as their supervisor, anticipating that he would "retaliate against the team" and "hold a grudge" because of their participation in the Open Door investigation. *Id.*; TR at 717.

Jacob also prepared a document entitled "Ammar Halloum Return to Work Integration Plan." CX 9 at 1. One portion of the plan, headed "Ground Rules Going Forward," listed a number of "unacceptable behaviors that will result in further disciplinary action up to and including termination of employee." *Id.* This list included intimidating or belligerent behavior, shouting or yelling, use of profanity, and disrespectful or rude behavior toward co-workers. CX 9. Employer admits that none of these had been problems with Halloum, and that Jacob included them by mistakenly cutting and pasting too much from an existing human resources document template. TR at 862-863. She created the Ground Rules as talking points for her use at the April 29 meeting. *Id.*

Complainant wrote for Dr. Liao and Dr. Howell letters stating he was medically restricted from working under the CAP before his scheduled return to work on April 29, 2002. TR at 349-352, 974. His health care providers signed them for him. TR at 974; CX 13; EXs 30, 55.

Callaghan and Jodi Jacobs, who stood for the unavailable Sherry Jacob,[9] met Complainant when he returned to FAB 12 on April 29, 2002 to give him the Hopes and Fears document. TR at 151-152, 861. Jodi Jacobs' mistake in giving him a copy of the Ground Rules caused the meeting to end when Halloum claimed reading it gave him an anxiety attack. TR at 153-154, 157; CX 19. He left with instructions to obtain clarification of his psychological limitations. TR at 938-939. As matters developed, Complainant did not return to FAB 12 until July 22, 2002. TR at 950.

The next day, May 1, 2002, Complainant wrote again to Intel's CEO Craig Barrett, reiterating his allegations that Callaghan had ordered him to take part in "unsound accounting practices" for the purpose of defrauding Intel investors. CX 11; EX 21. Sometime in May, 2002, Callaghan was made aware that Complainant had complained both to the SEC and to Barrett. TR at 529.

After the aborted April 29 meeting, Pam Foster, an Intel employee who was both a registered nurse and certified Occupational Health Specialist, asked Complainant's health care providers to clarify his limitations when he returned to work. TR at 86-88; CX 16. Foster contacted Dr. Howell on at least 4 occasions for clarification, which Dr. Howell considered unusual and excessive, but Foster's requests were consistent with Employer's treatment of other employees with similar stress-related restrictions on their return to work. TR at 88-89, 1245; CX 14, 15. Dr. Howell wrote on May 2, 2002 that Halloum was cleared to return, provided Employer did not subject him "to any form of mental stress and environment leading to anxiety." CX 13. As prohibited sources of mental stress, she specified the Hopes and Fears exercise, the Ground Rules, the CAP and "any other offensive exercises." *Id.*

[9] The similarity in surnames easily leads to confusion.

Foster, Jacob and Dr. Howell spoke by conference call to clarify Dr. Howell's restrictions on May 15, 2002. TR at 864-865. Jacob explained that there was no difference between the CAP and Complainant's normal duties — the CAP and his job were one and the same. TR at 943, 969. In her response of May 20, 2002, Dr. Howell maintained that Complainant was capable of concentrating and focusing on doing his tasks as required prior to his medical leave, but the CAP, Hopes and Fears exercise, and Ground Rules constituted "subjective expectations and measurements or derogatory language reflecting poorly on [Halloum's] character or his performance." CX 16. She believed such measures created a "hostile work environment" that would cause Complainant "further stress and anxiety" and make him unable to work. *Id.* The fundamental problem was that Dr. Howell did not state Complainant's limitations or restrictions in functional terms, but acted as an advocate for her patient. She ruled out work under the CAP, but when the goals of the CAP were the duties of his job, this left Intel in a Catch-22. The American Medical Association has developed one paradigm widely used in workers' compensation adjudications for expressing psychological (and physical) disabilities in functional, work-related ways. *See*, *American Medical Association Guides to the Evaluation of Permanent Impairment*, Chapter 14 (Linda Cocchiarella & Gunnar B. J. Anderson, eds., 5th ed. 2001). That system rates psychological limitations on a severity scale from 1 to 5[10] in the domains of Activities of Daily Living; Social Functioning; Concentration Persistence and Pace; and Adaptation (*i.e.,* the likelihood of "deterioration or decompensation in complex or worklike settings") *Id*. at 362-363. Had Dr. Howell framed any psychological limitations in some similar fashion, Intel would have known whether Complainant was able to do his job. His abrupt termination of the April 29th meeting due to anxiety symptoms raised the issue whether he could function in a work setting.

Because it was unclear to Intel what Complainant's work-related psychological restrictions would be when he returned to work, he remained on leave from April through July, 2002. On July 9, 2002, Foster requested a further clarification, asking specifically whether Complainant was unable to work if he must complete the CAP and whether he could receive performance management "designed to improve his performance to meet the requirements of his job." CX 20. Dr. Liao retracted his recommendation that Employer remove the CAP as a condition of Complainant's return to work on July 9. CX 21, TR 948. Dr. Howell gave no further clarification, and stood by her recommendation that Complainant return to work only if the CAP were removed. CX 23.

Complainant steadfastly resisted any return to work if he had to complete the CAP. To bring matters to a head Jacob e-mailed him on July 18, 2002, saying:

> As you have indicated in your prior emails, you of course are free to reject the open door and EEOC findings and to refuse to work under a CAP. You have two choices after pursuing your open door to conclusion: A, work at Intel under the terms of the CAP in good faith, in a good faith effort to address your performance issues, or B, elect the CAP buyout option where Intel provides you with pay for the remainder of the CAP

[10] One is used when "no impairment is noted", while a rating of 5 indicates an extreme level of impairment, which "preclude[s] useful functioning" in that domain. Intermediate severity levels also are defined. *AMA Guides*, Ch. 14, pg. 363.

> period and you elect to resign from Intel. Given your clear rejection of the CAP, we will process your resignation and buyout effective Thursday, July 25th, 2002.

CX 28. Complainant responded by e-mail on Friday, July 19, 2002, that he did not want to resign, and he would be at FAB 12 the following Monday at 8:00 a.m., ready to work. CX 29; TR at 810-811. Jacob was not at work that Monday morning, so she did not receive his response before his arrival. TR at 807, 833.

Halloum's wife told Pam Foster that Halloum had tape-recorded conversations with Intel employees[11]. TR at 979. Foster passed the disclosure on to Jacob. TR at 875-876.

When Complainant arrived at work at 8:00 a.m. that Monday, his identification/access badge had been deactivated because he was still on medical leave, so security would not permit him to enter. He interpreted his exclusion as a deliberate slight, feeling humiliated as arriving co-workers saw him detained by security outside the work area. CX 30. He informed Jacob in an email later that day of his unsuccessful attempt to return as he had promised, and asked to meet with her at 5:30 p.m. Tuesday (the next day). CX 30. Jacob reiterated that the CAP would not be removed, and confronted Halloum about his taping of conversations and reminded him that recording conversations with Intel employees was against company policy when she and Callaghan met him Tuesday evening. TR at 614-615, 875-876. He refused to answer any of her questions about taping. TR at 876. She also asked whether he would now meet with the Intel's investigators about his SEC complaint. TR at 875. He had been contacted during his medical leave to be interviewed as part of Rodgers' investigation, but refused. TR at 1163. He told the person who tried to set up the interview that he and Intel were "at war," and he would be interviewed only if Intel removed the CAP. TR at 1163, 1224.

Complainant was taken off medical leave and placed on administrative leave effective July 22, 2002 so he would be available to give an interview to one of Rodgers' investigators. TR at 877-878. This was significant to him, because he had no income since his 91st day of medical leave. Although he qualified for short term disability payments under insurance he had paid for, he did not regard himself as disabled, and so had refused to cash those checks. TR at 192. When interviewed on August 1, 2002 he described no delays in payments of invoices, only deferrals of purchases**.** CX 31; TR at 878, 1170-172.

Callaghan decided to remove Complainant's management responsibilities, and make him a "sole contributor" rather than a Group Leader after the July 23 meeting. TR at 558, 561-562. One reason was the commodity analysts' fears of retaliation against them. Although those fears remained, as late as April 29th Halloum still was to return as their supervisor. Four things had changed since the end of April. First, Halloum's failure to deny the taping allegation justified an inference that it was true, giving his three analysts (Theodoseau, Hess and Townsend), Jacob and Callaghan more reason to distrust him.[12] Second, Intel had lost patience with Halloum's insistence on the rescission of the CAP as a condition of his return to work, see Jacob's e-mail of July 18, above. Third, Halloum had tried to capitalize on the request to be interviewed about his

[11] Halloum's wife also had returned Halloum's company laptop to Intel.
[12] Only through discovery in this case did Halloum admit his taping and produce the tapes to Intel.

allegations to the SEC, declining the interview unless he was reinstated on his terms – no CAP. TR 1161-1164. Fourth, Callaghan had learned in May of Halloum's complaints about him to the SEC and to Intel's CEO. TR at 529. Callaghan told him on August 14, 2002 his CAP had been modified so he would have no supervisory duties when he returned to work. TR at 558.

Callaghan and Jacob presented the modified CAP to Halloum at a meeting at FAB 12 on August 19, 2002. EX 47; TR at 557. It credited him with having already worked 30 of the CAP's 90 day period before his medical leave. EX 46; TR at 441. In addition to the four original goals, the modified CAP assigned him to:

> 1) Develop a plan to eliminate $13 to $15 million in spending from FAB 12's operating budget for the second half of 2002 and obtain management approval for the plan by September 13, 2002;
>
> 2) Develop a program to eliminate the loss of spare part warranties at FAB 12 and obtain management approval of the program by August 30, 2002; and
>
> 3) Meet weekly with Callaghan to review his performance.

TR at 821-822; EX 46 at 1-2; EX 48. His salary and benefits were undiminished by the modifications. TR at 378. Callaghan reiterated that Complainant would be a sole contributor without supervisory responsibilities. CX 35, TR at 818. The three analysts remained under the supervision of Lana Rock, an employee of the same grade as Complainant, who had supervised them during most of his absence since February 1st. EX 48; TR at 201. Over the course of those 6 months, the group had successfully developed projects with other departments and increased its efficiency. *Id.*

Complainant questioned whether he could complete the assignments in his modified CAP within the brief time allotted without support staff. EX 48; TR at 378. He was apprehensive about completing aspects of the work that were not within his control,[13] and particularly the requirement to develop a program to eliminate the loss of spare part warranties, as another Intel employee, Tricia McGuire, told him that she had been working extensively on that specific problem without success. TR at 205, 218-219, 560-561. He confided to Dr. Howell that Intel's performance expectations had become unrealistic and that it would be very difficult for him to succeed. TR at 93. Based on the additional CAP requirements and Complainant's emotional state, Dr. Howell believed that the CAP was "a setup for [Complainant] to fail." *Id.* At least one of Employer's witnesses agreed with that assessment, albeit in the abstract.[14]

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[13] Complainant testified that the modified CAP "has tasks that can be measurable at least on the surface, like achieve $15 million (in cost cutting) for example. This is something scalable….The other one, I have to basically satisfy the perception of others…this is not very scalable because the manager might not approve it, no matter what I do." TR at 380.

[14] See the following exchange with Intel witness Carla Minnard:

> ALJ: Let me make sure that I understand…You're excluding the possibility that the CAP can be so onerous as to be impossible to fulfill. So that the employer, knowing that the employee had ratted him out, could then use this as a means of being shed of this person, claiming it was a management and performance decision and cloaking the discriminatory conduct? [continues on next page]

Callaghan made clear his dissatisfaction with Halloum's efforts under the modified CAP in their August 27, 2002 progress meeting. TR at 219, 385, 639. I do not believe Callaghan's testimony that the 2 assignments in the modified CAP could be completed within the allotted time, or that the periods for completing them were not firm. Complainant submitted a request to participate in Employer's Voluntary Separation Program (VSP) on August 27, 2002. CX 39. This was a separate, temporary program Intel offered to lower its labor costs by inducing employees to leave. Those employees left with four month's base pay, plus an additional amount based on length of service. TR at 646-647, EX 45. This was more advantageous than the remaining pro-rata buyout under his CAP, and he would not have qualified for the VSP if he were terminated for failure to achieve his CAP goals. Complainant ended his employment at Intel as of September 3, 2002. CX 44.

A tangential matter Intel raised also remains. Before October 23, 2000, Complainant worked for IBM in Tucson, Arizona. TR at 131, 287. Halloum and his family lived in Tempe (in the Phoenix area) before IBM hired him. He attempted to relocate to Tucson with his family while he worked at IBM, going so far as to place his four children in Tucson schools for a time, but his wife and the children were reluctant to leave the family home in Tempe. TR at 292-293. He rented an apartment and furniture in Tucson, where he stayed, but also maintained the Tempe residence where his family lived. TR at 287. When Callaghan offered the job at FAB 12, Complainant explained his family's difficulty in adjusting to Tucson and told Callaghan of their desire to return permanently to Tempe. TR at 292. As a new Intel hire, Complainant was eligible for relocation benefits if he resided more than 50 miles from the Intel facility where he would be working. TR at 288, 501, 895-896. He moved back to Tempe after Callaghan's job offer. The relocation agreement he submitted to Intel represented that his wife and children also were moving from Tucson, which affected the benefit calculation; Intel paid him nearly $18,000.00 in relocation benefits. EX 60; TR at 288. Only in the course of preparing for this litigation did Intel learn that Complainant's family members had not actually relocated to Tucson, making them ineligible for relocation benefits. TR at 292-293. Employer's penalty for falsification of company documents is involuntary termination. TR at 896.

Issues for Adjudication

1. Whether Complainant engaged in protected activity under the Act;

2. Whether Employer took unfavorable employment action against Complainant;

3. Assuming Complainant took part in a protected activity, was that activity a contributing factor to any unfavorable action;

> Minnard: [N]o, I think that's certainly a possibility.…[I]f Mr. Halloum said, "They put me on a CAP after April 16th, which means my CAP had made it more onerous, and that is retaliatory," it's absolutely within what you just suggested as a possibility, sure.

TR at 1308.

4. Whether Employer would have taken the same unfavorable employment action in the absence of Complainant's protected activity.

Conclusions of Law

This is a trial *de novo* rather than an appeal from OSHA's findings. The Secretary's interim final regulations under the Act are patterned after regulations that implement the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), codified at 29 C.F.R. part 1979, the Surface Transportation Assistance Act (STAA), codified at 29 C.F.R. part 1978, and the Energy Reorganization Act (ERA), codified at 29 C.F.R. part 24. *See*, Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 68 Fed. Reg. 31860 (May 28, 2003).

As in AIR 21, STAA and ERA cases, the Secretary will dismiss a complaint brought under the Act's whistle blower provisions if a complainant fails to make the *prima facie* showing which closely parallels the test developed under Title VII of the Civil Rights Act of 1964, as amended. 29 C.F.R. §§ 1980.104(b)(1), 1980.109(a); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802.[15]

By trial, the inquiry is whether a complainant can prove that his protected activity was a "contributing factor" to an unfavorable employment action. 29 C.F.R. § 1980.109(a); *Kester v. Carolina Light & Power Co.*, 2000-ERA-31, slip op. at 7 (ARB Sept. 30, 2003). Halloum's burden of proof under the Act closely mirrors the *McDonnell Douglas* requirement that he prove by a preponderance of evidence that he engaged in disclosures the Act protects, that Intel knew about them, and then took adverse action due to his protected activity. *Kester*, slip op. at 8. There is no need to evaluate whether Complainant has met his *prima facie* burden when the trial has been completed, as that analysis is related to procedures, such as motions for judgment on partial findings at the close of a plaintiff's case in a bench trial, that apply in U. S District Court, but not in this forum[16]. *See e.g*., *United States Postal Serv. v. Aikens*, 460 U.S. 709, 715 (1983); *Kester*, slip op. at 7. The *McDonnell Douglas* model nonetheless serves as an analytical tool to help determine the ultimate issue of whether Complainant suffered forbidden discrimination.

When a complainant proves that a protected activity contributed to an unfavorable employment action, no relief will be ordered if the employer demonstrates by clear and convincing evidence it would have taken the same action in the absence of any protected activity. 18 U.S.C. § 1514A(b)(2)(C); 49 U.S.C. § 42121(b)(2)(B)(ii); 29 C.F.R. § 1980.109(a). "Clear

[15] Under the Act, as in the *McDonnell Douglas* scheme, a complainant's *prima facie* case consists of evidence that 1) he engaged in protected activity; 2) his employer knew that he engaged in the protected activity; 3) the employee suffered an unfavorable personnel action; and 4) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action. 29 C.F.R. §§ 1980.104(b)(1), 1980.109(a).

[16] When *Aikens* was decided the mechanism was a motion for involuntary dismissal under former rule 41(b), Fed. R. Civ. P., (superceded in 1991), which has been replaced with a motion for judgment on partial findings under Rule 52(c), Fed. R. Civ. P. *See* the Advisory Committee notes to the 1991 amendment to Rule 52(c).

and convincing" evidence is more than a preponderance of the evidence but less than proof "beyond a reasonable doubt." *See Yule v. Burns Int'l Sec. Serv.*, 1993-ERA-12 (Sec'y May 24, 1995). Complainant retains the ultimate burden to prove that the employer discriminated against him for his protected activities. *Clement v. Milwaukee Transport Servs.*, 2001-STA-6 (ARB Aug. 29, 2003) (slip op. at 5). I will not analyze separately whether the reasons given by Intel for modifying the CAP were pretexts for discrimination, because I have considered all available evidence in determining whether it has proven it would have taken the same action in the absence of Complainant's protected disclosures.

A. Protected Activity

The Act protects employees who provide information to authorities in the executive branch, to Congress, or to the employer, that the employee reasonably believes show the employer violated federal laws against shareholder fraud. 29 C.F.R. § 1980.102(b)(1).

Complainant told the SEC on March 14, 2002 that Callaghan instructed him to delay payment of invoices until subsequent quarters to increase cash on Intel's balance sheet, and the CEO of Intel the same thing on April 16, 2002. The intense news coverage of Enron's creative accounting led him to believe that Callaghan's instructions amounted to a fraud on Intel's investors. A belief that an activity was illegal may be reasonable even when subsequent investigation proves a complainant was entirely wrong. The accuracy or falsity of the allegations is immaterial; the plain language of the regulations only requires an objectively *reasonable* belief that shareholders were being defrauded to trigger the Act's protections.[17]

The investigation the SEC required and accepted after review exonerated Intel. I find Complainant believed he had been asked to delay invoices, even though he never dealt with invoices. He satisfied his initial burden to prove he engaged in a protected activity.

B. Employer's Knowledge of Protected Activity

Intel knew of Complainant's allegations no later than April 16, 2002, when he sent similar allegations to Intel's Chief Executive Officer. This element of his case is satisfied. 29 C.F.R. §§ 1980.104(b), 1980.109(a); *Paynes v. Gulf States Utilities*, 1993-ERA-47, slip op. at 4-5 (ARB Aug. 31, 1999).

C. Unfavorable Personnel Action

The Secretary's regulations reach broadly, prohibiting retaliation by intimidating, threatening, restraining or in any other manner discriminating against an employee in the terms and conditions of employment. 29 C.F.R. § 1980.102(b). An employment action is unfavorable

[17] Cases arising under the STAA and other whistle blower laws hold a complainant's opposition to acts by an employer that he reasonably believes violate the law are protected, even if investigation proves the employer never violated a law. *Clement v. Milwaukee Transport Services, Inc.*, 2001-STA-6 (ALJ Nov. 29, 2001)(slip op. at 39). This is so whether employer never did what the employee complained about, or because the employer's actions were legal. *Id.*; *see also Minard v. Nerco Delama Co.*, 92-SWD-1 (Sec'y Jan. 25, 1994).

if it is reasonably likely to deter employees from making protected disclosures. A complainant need not prove termination or suspension from the job, or a reduction in salary or responsibilities. *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000).[18] *See also Daniel v. TIMCO Aviation Servs., Inc*, 2002-AIR-26 (ALJ June 11, 2003)

Employer says the CAP imposed on January 2, 2002 and modified on August 19, 2002 are essentially the same, and were the only adverse actions taken during Complainant's employment. TR at 705-705. Complainant argues that the January and August iterations of the CAP are separate adverse actions, Intel's insistence that he complete the CAP when he was to return to work after April 29, 2002 is another violation, and that the "Ground Rules" and "Hopes and Fears" documents he received at the April 29, 2002 meeting are additional intimidating retaliatory acts. TR at 338. Complainant also argues that Employer constructively discharged him. I will consider each of the unfavorable personnel actions alleged by Complainant, but evaluate whether the constructive discharge allegation under the topic of Employer's "dual motive," below.

1. The original CAP

Halloum had made no qualifying disclosures before Intel assigned the "improvement required" rating and imposed the original CAP on January 2, 2002. The CAP was a pre-existing remedy for earlier inadequate performance. Halloum's disclosures after Intel imposed it did not immunize him from management efforts he disliked, or convert them into forbidden discrimination. Insistence that Complainant complete the CAP upon return from medical leave was not retaliation.

Complainant also argues that requiring him to work under the CAP caused him so much mental distress and anxiety that it should be regarded as an unfavorable employment action. I am unconvinced that the suggestion to shadow his direct reports stigmatized him; while Complainant was an educated man, he lacked knowledge of Intel's manufacturing and accounting processes and procedures. Familiarizing himself with his support staff's jobs was a reasonable method of acquiring that knowledge.

Complainant always perceived the CAP as intolerable harassment, along with Employer's efforts to understand the nature of the limitations Drs. Liao and Howell had communicated. I do not accept the premise that Dr. Liao knuckled under to pressure from Intel when he withdrew his statement barring work under the original CAP. Dr. Howell's statement that he should not work in an environment that caused "stress and anxiety" provided no functional guide to what Complainant *could* do. Vagueness about the limitations reasonably invited Employers' initial request for clarification; Dr. Howell's inability or refusal to clarify prompted additional requests. Seeking more specificity about work-related limitations health

[18] Title VII case law has traditionally guided the adjudication of whistle blower cases, including the determination of whether an employer discriminated against a protected employee. *See Daniel v. TIMCO Aviation Servs., Inc*, 2002-AIR-26 (ALJ June 11, 2003). Whistle blower statutes are meant to encourage workers to disclose illegal and questionable activities, so their tests for unfavorable employment action encompass more than the adverse economic actions Title VII plaintiffs must prove; any action that would reasonably discourage a worker from making disclosures qualifies here. *Daniel*, *slip op.* at 15.

care providers communicated to Intel would not deter other employees from making protected disclosures. The requests for clarification were not unfavorable personnel actions.

2. The "Ground Rules" Document

The fragmentary language and bullet-point organization of the document convince me that the Ground Rules were intended to serve as an agenda for the April 29 meeting Jacob had expected to conduct rather than a strategy to harass Complainant. The document is not discriminatory on its face, and Employer did not intend to use it to punish protected whistle blowing or to give it to Complainant as an indirect warning to others not to disclose corporate acts to the government. Handing it to Complainant was not an unfavorable personnel action for purposes of the Act.

3. The "Hopes and Fears" Document

Neither the Hopes and Fears exercise, nor reducing to writing the apprehensions the three analysts who had reported to Halloum harbored about his return as their supervisor were done to intimidate, threaten, restrain or in any other manner discriminate against him in the terms and conditions of his employment. They were standardized efforts Intel used when managers changed. They also communicated to the analysts that management would protect them from reprisal or intimidation. Like the original CAP, these measures were neither discrimination nor strategies to deter others from disclosing illegal conduct.

4. The modified CAP

Loss of supervisory responsibilities is an unfavorable personnel action. *See Hooks v. Diamond Crystal Specialty Foods, Inc.*, 997 F.2d 793, 799 (10th Cir. 1993) (reassignment of duties is actionable discrimination if employee demonstrates decrease in pay, decrease in responsibility or requirement to use lesser degree of skill than his previous assignment). Callaghan's modifications removing his supervisory responsibilities and permanently reassigning his subordinates were adverse actions.

The modification also assigned Complainant two significant tasks. At the hearing, independent investigator Carla Minnard appeared not to know that the CAP had been modified. She conceded the possibility that CAP assignments could be so onerous as to guarantee failure and serve as a means of removing a whistle blower entitled to protection. Intel contends the modified CAP's tasks were reasonably attainable and therefore not discriminatory. The assignment to plan reductions in FAB 12's manufacturing budget was consistent with Complainant's existing job duties and not unreasonable *per se*.

Development of a plan to save $13-$15 million in manufacturing costs was a major project, yet he had to complete it and obtain management approval for it in less than a month, without the aid of Townsend, Hess and Theodoseau or any replacements, while also achieving the original four CAP goals and another new one. Requiring him to obtain management approval of the plan clearly was beyond his control. Taken together the cost reduction assignment in the modified CAP was unreasonable.

Halloum had 11 days to formulate an effective program to eliminate the loss of warranties, an area in which he had no previous direct experience, when Intel employee Tricia McGuire's attempts to do so had been unsuccessful for six months. The modified CAP set Complainant up for failure by assigning him unattainable tasks. The certain failure to achieve the modified CAP goals would result in his termination, so they not only adversely affected the terms of his employment, they would deter other employees from daring to make protected disclosures. Complainant proved the modifications to his original CAP were unfavorable employment actions.

D. Causation

As the final element, Complainant must prove that his disclosures to the SEC and to Intel's CEO contributed to the decision to modify his CAP. 29 C.F.R. § 1980.109(a). In the context of similar whistle blower cases, a contributing factor includes "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (citations omitted) (defining "contributing factor" in the Whistleblower Protection Act for federal employees). A whistle blower need not prove his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in an adverse personnel action.

An unfavorable personnel action taken shortly after a protected disclosure may lead the fact finder to infer that the disclosure contributed to the employer's action. 29 C.F.R. § 1980.104(b)(2). Judges have drawn inferences of causation when the adverse action happened as few as two days later, *Lederhaus v. Donald Paschen & Midwest Inspection Serv., Ltd.*, 1991-ERA-13 (Sec'y Oct. 26, 1992), to as much as about one year later. *Thomas v. Ariz. Pub. Serv. Co.*, 1989-ERA-19 (Sec'y Sept. 17, 1993). The causal connection may be severed by the passage of a significant amount of time, or by some legitimate intervening event. *Tracanna v. Arctic Slope Inspection Serv.*, 1997-WPC-1 (ARB July 31, 2001) (slip op. at 7-8).

Employer imposed the CAP modifications on August 19, 2002, some five months after Complainant made his allegations to the SEC on March 14, 2002, two months after Intel assigned Steve Rodgers to investigate whether those allegations were true, and immediately upon Complainant's actual return to work. Callaghan, the author of the modifications, had learned of the charges Complainant made about him to Intel's CEO Barrett and to the SEC in May. I do not believe he could segregate this knowledge from other reasons for the modifications; it played some role in his decision to modify the CAP as he did. It was not the primary motivating factor, but it need not be for Complainant to establish this element of his case. More than just the timing, the unreasonable nature of the two new assignments also leads me to infer retaliation. Setting Complainant up to fail by adding unreasonable goals to his CAP carried a none-too-subtle message of management's displeasure that would make others think twice about disclosing suspicions of corporate wrongdoing to the government.

E. Dual Motive

Because Complainant proved the modified CAP was imposed, at least in part, due to his protected disclosures, Intel had to prove by clear and convincing evidence that the CAP modifications would have been the same if Complainant never made his disclosures to the SEC or to its CEO. 29 C.F.R. § 1980.109(a); *Gonzalez v. Langone Pipeline & Utility Contracting Division*, 2001-STA-18 (ALJ Sept. 2001) (slip op. at 9) (applying "dual motive" test set forth in *Pogue v. U.S. Dep't of Labor*, 940 F.2d 1287, 1289-90 (9th Cir. 1991)). "Clear and convincing" evidence is more than a preponderance of the evidence but less than proof "beyond a reasonable doubt." *See Yule v. Burns Int'l Sec. Serv.*, 1993-ERA-12 (Sec'y May 24, 1995). Employer says it modified the CAP for his demonstrated inabilities to meet performance expectations and his violations of company policy.

1. Complainant's taping of conversations with other Intel employees

Employer believed Complainant recorded conversations before it modified his CAP. Taping violates explicit company policy, chills employee self-expression, is anathema to Employer's corporate culture, and Complainant knew it was grounds for dismissal. Employer's evidence on this point was consistent, undisputed by Complainant, and meets the clear and convincing standard. It was Employer's prerogative to modify Complainant's CAP as a means of enforcing this policy. Imposing unattainable goals is a somewhat ham-fisted way of doing so, but had it terminated Complainant outright, it would have been within its rights. The modifications accomplished the same thing indirectly.

2. Complainant's coercion of his support staff

Employer points to Halloum's attempts to coerce his support staff to give only positive evaluations of his performance during Sherry Jacob's investigation of his Open Door claim as another reason for modifying the CAP. I am fully persuaded the staff feared recrimination if he were returned to a supervisory role over them, which they expressed clearly during the Hopes and Fears exercise. These circumstances reasonably caused Employer to remove him as Group Leader in the modified CAP. Complainant's attempt to coerce his subordinates to say what he wanted them to say in evaluating his performance was good reason to recast his position to that of a sole contributor. He lost his management responsibilities as the result of his conduct, not due to any whistle blowing.

3. Complainant's job performance

Employer maintains that Halloum's inability to perform his job justified the modified CAP. Complainant had consistent difficulty meeting performance expectations; shortcomings in his performance appeared before his probation ended, and before his unusually lengthy absence of about a month toward the end of 2001. Intel's corporate milieu valued innovation and active contribution to multi-disciplinary team efforts. Complainant failed to demonstrate these qualities and never adapted to the corporate culture. After almost a year and a half in a responsible management position, he did not understand Intel's business well. This appeared repeatedly in

his evaluations, it is brought home by two things about his allegation of accounting fraud: he did not understand that Intel used accrual instead of cash accounting, so delaying payments to its suppliers would not increase Intel's cash position in a way that gave it any advantage on Wall Street, and he approved purchase requisitions and receiving memos, never invoices. His insistence when he first met with Jacob about his Open Door complaint that the original CAP be removed and Callaghan be fired illustrated his inability to appreciate how unrealistic his demands were. He exhibited extremely poor judgment when he attempted to manipulate his subordinates Hess, Theodoseau and Townsend to make him look good in the Open Door investigation he had initiated, and again when he unsuccessfully tried to barter for removal of the CAP in return for cooperation in the SEC investigation he set in motion. Taping so many conversations with Intel employees beginning in January 2002, when he knew it was forbidden to do so, was a grave error[19]. The protected disclosures were not factors that brought matters to a tipping point. He was on his way out anyway. By the time the CAP was modified, Complainant was perceived as an untrustworthy employee who consistently had performed poorly, flouted important work rules, and alienated his subordinates and manager. It was appropriate to remove his supervisory duties and give him other assignments. Intel would have imposed onerous and unattainable modifications to his CAP without regard to his disclosures to the SEC or to Intel's CEO Barrett.

My rejection of portions of Callaghan's testimony does not establish that Intel violated the Act. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993). Viewing the evidence as a whole, Complainant failed to persuade me that Employer retaliated against him for whistle blowing. *Id*. at 524.

4. Constructive Discharge

A constructive discharge qualifies as an unfavorable employment action, for it is legally equivalent to discharge by the employer. *Jordan v. Clark*, 847 F.2d 1368, 1377 & n. 10 (9th Cir. 1988); *Draper v. Coeur Rochester*, 147 F.3d 1104, 1110 (9th Cir. 1998) ("Constructive discharge is . . . just one form of wrongful discharge"). The key factor in constructive discharge cases, actionable discrimination that becomes so intolerable that the complainant quits, is missing. I already found that the removal of management authority and the imposition of the two modified CAP assignments were adverse actions under the Secretary's regulations, but also that they were justified. Complainant proved that Intel set him up to fail in August 2002, but this begs the question of whether removal in that fashion was retaliation for whistle blowing. Intel demonstrated by clear and convincing evidence that it had adequate reasons to fire Complainant, directly or indirectly, unrelated to his protected disclosures to the SEC and to Intel's CEO.

[19] I leave open the question whether an employee might escape discipline under an employer's long standing policy against secret taping if the tape gave direct proof of invidious discrimination. Where it does not, the violation of company policy serves as a legitimate, non-discriminatory basis for discharge. *Deiters v. Home Depot USA, Inc*., 842 F.Supp. 1023, 1030 & n. 2 (M.D. Tenn. 1993).

5. Complainant's Relocation Package

Any misrepresentation about the number of family members who relocated from Tucson to Tempe could not have served as a justification for the modifications made to his CAP in August 2002, for it was discovered only much later. Intel apparently combed through things Complainant had submitted to it, as part of its defense of this claim. Intel proved other contemporaneous reasons for the CAP modifications. An employer's after-acquired evidence of wrongdoing that could have resulted in discharge does not bar an employee from prevailing in a retaliation case. *McKennon v. Nashville Publishing Co.*, 513 U.S. 352, 358 (1995). The relocation misrepresentation would have limited the remedy had Complainant prevailed. *Id.*; s*ee also O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 760 (9th Cir. 1996).

RECOMMENDED ORDER

It is recommended that Complainant's complaint be **DISMISSED**.

A

WILLIAM DORSEY
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1908.109(c) and 1980.110 (a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002; Interim Rule, 68 Fed. Reg. 31860 (May 29, 2003).